

**BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

CRAIG CARY)	
Claimant)	
VS.)	
)	Docket No. 1,002,314
USA CABLE)	
Respondent)	
AND)	
)	
CNA RSKCo)	
Insurance Carrier)	

ORDER

USA Cable and its insurance carrier appealed the October 31, 2002 preliminary hearing Order entered by Administrative Law Judge Steven J. Howard.

ISSUES

This is a claim for a February 4, 2002 accident and resulting left shoulder injury. In the October 31, 2002 Order, Judge Howard determined Mr. Cary was an employee of USA Cable at the time of the accident and, consequently, awarded him medical benefits under the Workers Compensation Act.

USA Cable and its insurance carrier contend Judge Howard erred. They argue Mr. Cary was hired to work as an independent contractor rather than as an employee. Accordingly, they request the Board to reverse the preliminary hearing Order and deny Mr. Cary's request for benefits.

Conversely, Mr. Cary argues the Order should be affirmed as the evidence establishes that he was an employee of USA Cable for purposes of the Workers Compensation Act. That is the only issue before the Board on this appeal.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

After reviewing the record compiled to date and after considering the parties' arguments, the Board finds and concludes that the October 31, 2002 preliminary hearing Order should be affirmed.

On February 4, 2002, Mr. Cary injured his left shoulder when he slipped and fell on ice. As USA Cable was allegedly withholding workers compensation insurance premiums from Mr. Cary's checks, Mr. Cary did not learn that his accident was not covered under workers compensation insurance until after the February 2002 accident. Mr. Cary was somewhat surprised to learn that coverage for his February 2002 accident was being disputed as he had been advised by USA Cable that an earlier injury would be taken care of by workers compensation insurance.

Mr. Cary initiated this claim contending USA Cable is responsible for his work-related accident as their relationship was in the nature of employer-employee rather than principal-independent contractor for purposes of the Workers Compensation Act.

It is often difficult to determine in a given case whether a person is an employee or independent contractor because the employer-employee and principal-independent contractor relationships share similar elements.¹ And there is no absolute rule for determining whether an individual is an independent contractor or an employee.² The relationship of the parties depends upon all the facts and the label that they choose to employ is only one of those facts. The terminology used by the parties is not binding when determining whether an individual is an employee or an independent contractor.³

But the primary test used by the courts in determining whether the employer-employee relationship exists is whether the employer has the right of control and supervision over the work of the alleged employee along with the right to direct the manner in which the work is to be performed. It is not the actual interference or exercise of the control by the employer but the existence of the right or authority to interfere or control that renders one a servant rather than an independent contractor.⁴

Moreover, in addition to the right to control and the right to discharge a worker, other commonly recognized tests of the independent contractor relationship are: (1) the existence of a contract to perform a certain piece of work at a fixed price; (2) the independent nature of the worker's business or distinct calling; (3) the employment of assistants and the right to supervise their activities; (4) the worker's obligation to furnish tools, supplies, and materials; (5) the worker's right to control the progress of the work; (6)

¹ *Jones v. City of Dodge City*, 194 Kan. 777, 402 P.2d 108 (1965).

² *Wallis v. Secretary of Kans. Dept. of Human Resources*, 236 Kan. 97, 689 P.2d 787 (1984).

³ *Knoble v. National Carriers, Inc.*, 212 Kan. 331, 510 P.2d 1274 (1973).

⁴ *Wallis*, 236 Kan. at 102-103.

the length of time that the worker is employed; (7) whether the worker is paid by time or by the job; and (8) whether the work is part of the regular business of the employer.⁵

Based upon the following facts, the Board concludes the relationship between Mr. Cary and USA Cable was that of employer-employee for purposes of the Workers Compensation Act at the time of the February 4, 2002 accident:

- i. On October 24, 2001, USA Cable, who had contracted to install cable for Everest Cable Connections (Everest), hired Mr. Cary as an installer.
- ii. Although Mr. Cary had approximately four years of experience installing cable, USA Cable and Everest trained Mr. Cary in the specific manner in which Mr. Cary was to carry out his work.
- iii. In addition to training, once a week Mr. Cary was required to attend a meeting at Everest to discuss problems that other installers were having, including those installers who were directly employed by Everest.
- iv. USA Cable set Mr. Cary's work hours and required him to work Monday through Friday and scheduled him to work two Saturdays each month.
- v. Mr. Cary worked for USA Cable (and indirectly for Everest) and no one else from October 2001 through the date of accident on February 4, 2002.
- vi. USA Cable assigned the jobs and the sequence those jobs were to be performed, and USA Cable (or Everest) also determined the time those specific jobs were to start and end.
- vii. USA Cable supplied all the materials such as the cable and the digital boxes that were required for the assigned jobs.
- viii. USA Cable required Mr. Cary to turn in daily invoices or work orders delineating the work that he performed on each job.
- ix. USA Cable required Mr. Cary to check in after completing the morning job and after completing the afternoon job assigned to him. Everest required Mr. Cary to advise when he arrived at a job site and when he departed a job site, as well as contacting the company regarding customers' accounts.

⁵ *McCubbin v. Walker*, 256 Kan. 276, 886 P.2d 790 (1994).

- x. USA Cable required Mr. Cary to carry a Nextel phone in order that he would be in contact with the company.
- xi. USA Cable required Mr. Cary to display an Everest sign on his truck, required him to wear a uniform with an Everest logo, and required him to keep a neat appearance.
- xii. Mr. Cary was required to assist other installers, if he received such a dispatch.
- xiii. Mr. Cary did not operate an independent business in which he offered services to the general public.
- xiv. The work that Mr. Cary performed for USA Cable was integral to its business.

The Board is aware that other aspects of the relationship between Mr. Cary and USA Cable, for example the written contract the parties executed, suggest that Mr. Cary was an independent contractor. The Board, however, is persuaded that the preponderance of the evidence establishes that Mr. Cary was USA Cable's employee for purposes of the Workers Compensation Act. The significant control that USA Cable exercised over Mr. Cary indicates that Mr. Cary was not an independent contractor.

As provided by the Act, preliminary hearing findings are not binding but subject to modification upon a full hearing of the claim.⁶

WHEREFORE, the Board affirms the October 31, 2002 preliminary hearing Order entered by Judge Howard.

USA Cable and its insurance carrier filed their application for review in this appeal under docket numbers 1,002,312; 1,002,313 and 1,002,314. As it appears the appeals under docket numbers 1,002,312 and 1,002,313 were made in error, the Board dismisses those appeals.

IT IS SO ORDERED.

⁶ K.S.A. 44-534a(a)(2).

Dated this ____ day of January 2003.

BOARD MEMBER

c: Leah Brown Burkhead, Attorney for Claimant
Michael R. Kauphusman, Attorney for Respondent and its Insurance Carrier
Steven J. Howard, Administrative Law Judge
Director, Division of Workers Compensation